No. 6352

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

WARD DANIELS,
Claimant and Appellant,

TRIPLE GAS SCREW MOTOR BOAT "RETHALULEW," Official No. 227860,
Respondent,

vs.

UNITED STATES OF AMERICA,
Libelant and Appellee.

Appeal from the District Court of the United States of America, in and for the Southern District of California, Central Divison

Brief of Appellant

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Los Angeles Review, Law Printers, 120 So. Spring St., Los Angeles. TU 1377

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Statement of the Case.

This cause originated in a libel brought by the United States of America against the Triple Gas Screw Motor Boat "Rethalulew," seeking to have the said vessel forfeited to the United States for various alleged offenses against the shipping and revenue laws. The condemnation and forfeiture of the respondent vessel was sought on the following alleged grounds set out in the libel:

(1) For alleged smuggling of intoxicating liquor into the United States in violation of law. 46 *U. S. C. A.* Sec. 21. (R. 6-7).

(2) That the respondent vessel was enrolled and licensed as a pleasure yacht and engaged in trade other than that for which she was licensed. 46 *U. S. C. A.* Sec. 325. (R. 3-4-5-6).

(3) That the respondent vessel proceeded on a foreign voyage without first giving up her license to the Collector of the district. 46 *U. S. C. A.* Sec. 278. (R. 7-8).

(4) For an alleged fraudulent registry of the respondent vessel by its owner and master. 46 *U. S. C. A.* Sec. 60. (R. 8).

(5) That the respondent vessel was laden and unladen with cargo and merchandise of the value of $500 or more, without a special license or permit therefor, issued by the Collector of Customs. 19 *U. S. C. A.* Sec. 266. (R. 22-23).

(6) That the respondent vessel, while enrolled as a pleasure vessel, was operating in violation of her license in the transportation of merchandise for pay. 46 *U. S. C. A.* Sec. 103. (R. 23-24).

(7) That the respondent vessel arrived from a foreign port or place with dutiable merchandise on board and failed to report to the Customs Officer of the United States at the port or place of her arrival, and failed to deliver to said officer a manifest of all dutiable articles brought from some foreign country or place in such yacht or vessel, in violation of her license. 46 *U. S. C. A.* Sec. 106. (R. 24).

The said libel was filed on April 22nd, 1929, and on

said day an order for process duly issued, and under said process the respondent vessel was seized by the United States Marshal for the Southern District of California, and is still held in his possession.

The claimant and appellant, Ward Daniels, duly filed an answer to the libel, in which is set up the ownership of the "Rethalulew" by the claimant and appellant by purchase from the original owner, James H. Curwin, on December 5th, 1928, for the sum of $9542; that Curwin was the first owner of the boat, which was registered with the Collector of Customs at San Pedro, California; that the transfer of the respondent vessel to claimant and appellant was evidenced by a bill of sale duly recorded with the Collector of Customs, and the immediate delivery of the possession of the respondent vessel to the claimant and appellant; that claimant had no knowledge and no notice, actual or constructive, of any unlawful use of the respondent vessel by its previous owner or master, and that the respondent vessel was purchased by claimant in good faith; the answer further specifically denied all of the allegations of the libel and prayed for an appraisal and delivery of the respondent vessel to the claimant, that the action be dismissed, and for general relief (R. 14-15-16-17-18-19-20-21).

Thereafter, and on February 3rd, 1930, a stipulation was entered into between the United States District Attorney for the Southern District of California and Otto Christensen, proctor for claimant and appellant, that an order be entered by the court referring the trial of this cause to David B. Head, Commissioner, and that said Commissioner shall have authority to take

testimony and continue the trial from day to day, to make findings of fact and make a report thereon, and such order was duly entered pursuant to such stipulation by the Hon. Paul J. McCormick, United States District Judge for the Southern District of California, before whom this cause was pending (R. 375, 386).

Thereafter, the said cause came on for trial before the Hon. David B. Head, Commissioner, on May 27th, 1930, and the trial thereof concluded on May 29th, 1930, and thereafter counsel presented their arguments in the matter by the filing of written briefs (R. 375).

Thereafter, and on August 27th, 1930, the Commissioner made and filed his report to the court, in which report he made the following findings of fact and conclusions of law:

> "That the said vessel was registered on July 30, 1928, with the Collector of Customs at the port of Los Angeles as a pleasure vessel by one, James H. Curwin, as owner and John McClusky as master;
>
> That on or about September 30, 1928, the respondent vessel made contact with the schooner 'Przemsyl' at a point off the coast of Southern California and removed from the 'Przemsyl' a large quantity of intoxicating liquors to another vessel, 'L'Aquila,' and that the vessels 'Przemsyl' and 'L'Aquila' were lying off the coast of Southern California with cargoes of liquor on board which said cargoes were intended to be smuggled into the United States;
>
> That during the months of August and September, 1928, the respondent vessel was frequently absent from her home port and that during that period of time she made contact on several occasions

with the schooner 'Przemsyl' and took from the 'Przemsyl' cargoes consisting of intoxicating liquors;

That during all the times above referred to the master of the vessel was the aforesaid John McCluskey and the said McCluskey continued as master of said vessel until the vessel was taken into custody by the United States Marshal under the process of this case.

That the vessel was licensed December 5, 1928, to the claimant, Ward Daniels, and the said John McCluskey at the same time took the master's oath required by law.

Requests for findings of fact in addition to the above have been made by both parties. The Commissioner is unable to find that the evidence establishes that intoxicating liquors were brought into the territorial limits of the United States by the respondent vessel. Further, the Commissioner is unable to find that the claimant, Ward Daniels, stands as an innocent purchaser but on the contrary, the circumstances surrounding his purchase of the vessel should have put him upon inquiry. The short period of time elapsing between the date of registration of the vessel and the violations of her registry gives rise to the presumption that the owner and the master knew at the time of registration that the vessel was to be used for a purpose other than that for which she was registered.

Wherefore, it is concluded:

1. That the motor boat 'Rethalulew' engaged in a trade other than that for which she was registered, in violation of Title 46, Sec. 325, United States Code;

2. That the said vessel was fraudulently registered, in violation of Title 46, Sec. 60 United States Code;

3. That the other charges of the libel have not been sustained.

It is recommended that a decree be entered declaring the respondent vessel forfeited to the United States and that all costs be assessed against the claimant.

Respectfully submitted,

DAVID B. HEAD,
Commissioner."

(R. 376-378)

Thereafter, and on the 2nd day of September, 1930, the claimant and appellant seasonably filed his exceptions to the Commissioner's report (R. 378-9, 380-81-82), and the said exceptions to the Commissioner's report were duly argued by counsel for appellant and appellee.

Thereafter, and on the 19th day of September, 1930, the court duly overruled and denied the exceptions of claimant and respondent to the report of the Commissioner and allowed exceptions to said ruling, said order of the District Court being in words and figures as follows:

"The exceptions of claimant and respondent herein to the report of the Commissioner made and filed herein on August 27, 1930, are and each is, overruled and denied. Exceptions are allowed to claimant and respondent to each of the aforesaid rulings.

The said report of said Commissioner is confirmed and the recommendations therein are adopted, and it is accordingly ordered that a decree be entered herein declaring the respondent vessel forfeited to the United States with all costs herein against claimant. An exception to the aforesaid ruling is

hereby noted and allowed to respondent and claimant respectively. See written conclusions of the Court filed herein this day.

Dated at Los Angeles, California, Friday, September 19, 1930." (R. 383-4-5).

Thereafter, in the State of New York, and on the 6th day of October, 1931, the Hon. Paul J. McCormick, Judge of the United States District Court for the Southern District of California, in whose court this cause was then pending, made and entered other and different findings of fact and conclusions of law than those theretofore made and found by the Commissioner who tried the case, which were approved by the Court on September 19, 1930, and a decree ordered to be entered thereon (R. 386-7-8-9); and on the said 6th day of October, 1930, the Hon. Paul J. McCormick, as a District Judge for the Southern District of California, being then and there in the City of New York, in the State of New York, signed and made his decree in this cause (R. 389-91-92; 408-9-10). That the appellant and respondent have never consented to or ratified the act of said District Court of the State of California in sitting in the State of New York, and there making and signing its findings of fact, conclusions of law, and decree in this case, as made and signed by said Court on October 6th, 1930.

Thereafter, and on the 1st day of November, 1930, the appellant and respondent filed their petition for appeal, to which petition for appeal was attached assignment of errors, upon which petition for appeal and assignment of errors the District Court duly made an order allowing said appeal, and a citation on appeal

was thereupon duly issued and served upon the appellee, together with a copy of the petition for appeal, assignment of errors and order allowing appeal (R. 393-4-5-6-7-8-9, 400-1-2-3-4-5-6-7-8, and p. 2).

Thereafter, and on the 6th day of November, 1930, a notice of filing supersedeas and cost bond in the sum of $2750 was duly filed and served upon the attorneys for appellee. (R. 412-413-414-415).

Specification of Errors on Which Appellant Will Rely.

I.

That the Commissioner erred in finding as a fact that on September 30, 1928, the respondent vessel made contact with the schooner "Przemsyl" at a point off the coast of Southern California, and removed from the "Przemsyl" a large quantity of intoxicating liquors to another vessel, the "L'Aquila," the said findings of fact being wholly unsupported by the evidence and contrary thereto, in that the evidence fails to show that the respondent vessel "Rethalulew" made contact with the schooner "Przemsyl" at a point off the coast of Southern California on said date, or at any other time. (A. E. 1, R. 394).

II.

That the Commissioner erred in finding as a fact that during the months of August and September, 1928, the respondent vessel was frequently absent from her home port, and that during that period of time she made contact on several occasions with the schooner "Przemsyl" and took from the "Przemsyl" cargoes con-

sisting of intoxicating liquors, for that said finding is wholly unsupported by the evidence and is contrary thereto and that said finding of fact is indefinite, ambiguous, vague and incomplete, in that said finding of fact does not state at what times or on what dates during the months of August and September, 1928, the respondent vessel was absent from her home port, nor the dates of the absences of the respondent vessel from her home port on which respondent made contact with the schooner "Przemsyl" and took from the "Przemsyl" cargoes consisting of intoxicating liquors (A. E. 2, R. 395).

III.

That the Commissioner erred in finding as a fact that the vessels "Przemsyl" and "L'Aquila" were lying off the coast of Southern California with cargoes of liquor on board, which cargoes of liquor were intended to be smuggled into the United States, for that said finding is wholly unsupported by the evidence and is contrary thereto, there being no evidence that the cargoes of the vessels "Przemsyl" and "L'Aquila" were intended to be smuggled into the United States, and no evidence that any portion of their cargoes were ever brought into the territorial limits of the United States by the respondent vessel, or by any other vessel. (A. E. 3, R. 395).

IV.

That the Commissioner erred in finding that the owner and master of the respondent vessel knew at the time of registration that the respondent vessel was to be used for a purpose other than that for which she

was registered, said finding being wholly unsupported by the evidence, and contrary thereto, in that there is no evidence in the record showing that the owner and master knew at the time of registration that the respondent vessel was to be used for a purpose other than that for which she was registered. (A. 2-4, R. 396).

V.

That the Commissioner erred in making his conclusion No. 1, to-wit, that the motor boat "Rethalulew" engaged in a trade other than that for which she was registered in violation of Title 46, Sec. 325, United States Code, in that said conclusion is wholly unsupported by the evidence, is contrary thereto, and is not supported by any findings of fact, in that the evidence and findings do not show that the respondent vessel engaged in a trade other than that for which she was registered, and that said Conclusion No. 1 is against law. (A. E. 5, R. 396).

VI.

That the Commissioner erred in making his conclusion No. 2, to-wit, that the said vessel was fraudulently registered in violation of Title 46, Sec. 60 of the United States Code, for that said conclusion No. 2 is wholly unsupported by the evidence and is contrary thereto, and is not sustained by the findings, for the reason that the evidence and the findings show conclusively that the respondent vessel was not fraudulently registered, that said conclusion No. 2 is founded upon a presumption, and is against law. (A. E. 6, R. 397).

VII.

That the Commissioner erred in admitting in evidence "Patrol Boat Log Book U. S. Coast Guard Cutter CG 253," libelant's Exhibit 15, for the reason that no proper foundation was laid therefor, that said log was not properly identified and proved, and is not a public record. (A. E. 11, R. 398).

VIII.

That the Commissioner erred in refusing to admit and consider the evidence of the witness Leonard Wood, and by refusing the offer of proof made by respondent and claimant in connection therewith. Said evidence and offer of proof so excluded and rejected being in words and figures as follows:

> "Mr. Christensen: I am going to offer to prove first : "Q.—Do you remember having seen motor boat 'A-1817' at any time during the months of June, August and September, 1928?" And that this witness would answer; "yes"; and the following question: "Q.—You say you saw motor boat 'A-1817' during the months of July and August, 1928?" and the answer to that question "Yes." And to the question: "Q.—Where did you see it during those two months?" His answer would be: "I saw her when they brought her into the yards; when she was brought into the yard by the Coast Guard Cutter"; and the following question: "Q.—About when did they bring her in?" "A.—On July 9, 1928"; that would be his answer. That to the question: "If it was July 9, 1928," that he saw the boat brought in, that he would answer to that question, "Yes, sir, that is the date that the boat

was hauled out on the Marine Ways"; and the question: "How long did she remain there," his answer would be: "She remained there from July 9th until September 15th." "Q.—What was done to her at that time." To that his answer would be "The 'A-1817' was overhauled and the motors were taken out and cleaned"; "Q.—Was there any change made of the location of the cabin?" And his answer would be: "Yes, sir." And the question: "How long was the 'A-1817' on the Ways?" His answer would be: "We had it in our custody from July 9, 1928, to September 15, 1928." (A. E. 8, R. 120, 121).

IX.

That the Commissioner erred in refusing to admit and consider the evidence of the witness L. H. Williams, and in refusing the offer of proof made by the respondent and claimant in connection therewith. Said evidence and offer of proof so excluded and rejected being in words and figures as follows:

"Mr. Christensen: I now offer to prove by this witness that on the 5th day of July, 1928, he saw a boat, motor boat 'A-1817,' and that the boat that he saw was the boat appearing in the picture that I heretofore offered to prove as the picture of the 'A-1817'; that he saw that boat on the 5th day of July, 1928. Next offer to prove that he saw that boat at San Nicholas Island, and that San Nicholas Island is about 40 miles southwest of San Pedro Harbor; further offer to prove that at the time he saw the 'A-1817,' at that time, that the 'A-1817' was swamped and in a water-logged condition, and that he boarded the boat on July 5, 1928. I further offer to prove by this witness that he will testify

that the boat at the time he boarded it was in a water-logged condition and had been so for a day or two. Further offer to prove by this witness that he took her in tow and towed her toward San Pedro Harbor; that while towing her to San Pedro Harbor the boat, the 'A-1817,' became loose from the patrol ship 257 on which the witness was at that time; that he so lost the boat on the night of July 6th, and later found it in the early morning of July 7th; and that the 'A-1817' was then towed to San Pedro. I may say that the testimony shows here Santa Barbara. The transcript should have read San Pedro. The boat was taken to the base at the Los Angeles Ship Yards at that time. Offer to prove all of that and each and every separate offer of proof." (A. E. 9, R. 406).

X.

That the Commissioner erred in finding that the claimant was not a bona fide purchaser, in good faith, without notice, and for value, of the respondent vessel, in that the evidence on that point offered by the claimant was wholly undisputed and uncontradicted, and the libelant offered no evidence thereon. (A. E. 13, R. 398).

XI.

That the Commissioner erred in refusing to find that the claimant was a bona fide purchaser for value, without notice, of the respondent vessel, and entitled to be protected in his purchase, in that the uncontradicted evidence shows that claimant bought the respondent vessel and paid full value therefor before the said vessel was libeled in this proceeding, or seized herein, and

without notice of any claim of forfeiture to be made by the libelant, and that the evidence contained in this record fails to support any claim of forfeiture of the vessel as against the rights of claimant. (A. E. 14, R. 398).

XII.

That the court erred in making its finding of fact No. 4, to-wit, that on or about September 30, 1928, the respondent vessel made contact with the schooner "Przemsyl" at a point off the coast of Southern California and removed from said schooner "Pszemsyl" to another vessel called the "L'Aquila" a large cargo of merchandise consisting of intoxicating liquor, and that at said time said vessels "Przemsyl" and "L'Aquila" were lying off the southern coast of the State of California with cargoes of liquor on board, which said cargoes were intended to be smuggled into the United States, the said finding of fact is wholly unsupported by the evidence, and is contrary thereto, in that the evidence does not show that the respondent vessel "Rethalulew" made contact with the schooner "Przemsyl" at a point off the coast of Southern California on said date, or at any other time, and there being no evidence of any kind whatsoever that the cargoes of the vessels "Przemyl" and "L'Aquila" were intended to be smuggled into the United States, and no evidence that any portion of their cargoes was ever brought into the territorial limits of the United States by the respondent vessel, or by any other vessel. (A. E. 21, R. 400-401).

XIII.

That the court erred in making its finding of fact No. 5 that during the months of August and September, 1928, the respondent vessel was frequently absent from her home port and that during that period of time she made contact on several occasions with the schooner "Przemsyl" and took from the "Przemsyl" cargoes, for that said finding is wholly unsupported by the evidence, and is contrary thereto, and that said finding of fact is indefinite, ambiguous, vague and incomplete, in that said finding of fact does not state at what times or on what dates during the months of August and September, 1928, the respondent vessel was absent from her home port, nor the dates of the absences of the respondent vessel from her home port on which the respondent vessel made contact with the schooner "Przemsyl" and took from the "Przemsyl" cargoes. (A. E. 22, R. 401).

XIV.

That the court erred in making its finding of fact No. 8, to-wit, "that the Triple Gas Screw Motor Boat "Rethalulew," Official No. 227860, was fraudulently enrolled and licensed on June 30, 1928, in the United States Custom House, San Pedro, California, in that at said time and place the owner and master, knowing that the Triple Gas Screw Motor Boat "Rethalulew" was not to be used exclusively for pleasure and that said motor boat would be used in trade, knowingly and fraudulently represented that the said Triple Gas Screw Motor Boat "Rethalulew," Official No. 227860, would be used exclusively for pleasure and would not be used

in trade," for that said conclusion is wholly unsupported by the evidence, and is contrary thereto, in that the evidence shows that the respondent vessel was not engaged in a trade other than that for which she was registered and the evidence further shows that the owner and master of the respondent vessel did not make any fraudulent representations in registering the respondent vessel and did not knowingly and fraudulently represent that the said Triple Gas Screw Motor Boat "Rethalulew" would be used exclusively for pleasure and would not be used in trade. (A. E. 23, R. 401).

XV.

That the court erred in making its conclusion of law No. 1, the same being against law. (A. E. 24, R. 402).

XVI.

That the court erred in making its conclusion of law No. 2, the same being against law. (A. E. 25, R. 402).

XVII.

That the court erred in making its conclusion of law No. 3, the same being against law. (A. E. 26, R. 402).

XVIII.

That the court erred in finding the issues for the libelant. (A. E. 27, R. 402).

XIX.

That the court erred in decreeing that the respondent Triple Gas Screw Motor Boat "Rethalulew," her engines, furniture apparel, etc., be condemned and forfeited to the United States of America, and in decree-

ing that the said Triple Gas Screw Motor Boat "Rethalulew" be delivered by the United States Marshal for the Southern District of California to Commander Section Base 17, United States Coast Guard, San Pedro, California, for use in the enforcement of the custom laws, and in decreeing that the claimant herein, Ward Daniels, pay all costs, including costs of storage and care of said vessel, for that the said decree is against the manifest weight of the evidence, and is contrary to law. (A. E. 28, R. 403).

XX.

That the said decree is contrary to law. (A. E. 29, R. 403).

XXI.

That the court erred in making and entering its findings of fact and conclusions of law, and decree herein, for that the said findings of fact, conclusions of law and decree were made and signed by the Judge, Paul J. McCormick, beyond the jurisdiction of District Court of the United States for the Southern District of California, and were made and signed by Paul J. McCormick a Judge of the District Court of the United States for the Southern District of California, while in the State of New York and not within the State of California. (A. E. 30, R. 403).

BRIEF OF ARGUMENT

I.

The Findings and Judgment in this Case Are Coram Non Judice and Void.

We shall first argue Specification No. 21 (A. E. 30, R. 403, 408, 409) as it is decisive of this case in favor of appellant. The findings of fact, conclusions of law, and decree made and signed in this case by the Judge of the United States District Court for the Southern District of California, in whose court this cause was then pending, were non-judicial acts and void—a nullity in law. The record shows that the findings of fact, conclusions of law and the decree were made and signed by the Hon. Paul J. McCormick, United States District Judge for the Southern District of California, while he was in the State of New York and not within the State of California, and while the said Judge was not sitting or acting as a court or judge of the United States District Court for the Southern District of California, or of any other United States District Court (R. 408-409). The findings of fact, conclusions of law and decree entered in this cause were presented by the United States District Attorney for the Southern District of California to a Judge of the United States Court for said District in the State of New York, and in that state were signed by the Judge without the consent of the appellant.

It is obvious that the Judge of a District Court of the United States of one of the Districts in the State of California cannot act judicially in a case tried before

him in California when he is without the limits of that state. This is not the case of a judge of one district being assigned to sit in another district and there try cases, as provided for by Section 18 of the *Judicial Code*, which provides that:

> "Any designated and assigned judge who has held court in another district than his own shall have power, notwithstanding his absence from such district and the expiration of the time limit in his designation, to decide all matters which have been submitted to him within such district, to decide motions for new trials, settle bills of exceptions, certify or authenticate narratives of testimony, or perform any other act required by law or the rules to be performed in order to prepare any case so tried by him for review in an appellate court; and his action thereon in writing filed with the clerk of the court where the trial or hearing was had shall be as valid as if such action had been taken by him within that district and within the period of his designation."

Nor is this case within the provisions of Sections 13, 14, 17 and 19 of the Judicial Code. When Judge McCormick made and signed the findings of fact, conclusions of law and decree in this cause, he was in New York sitting as a member of the Wickersham Law Enforcement Committee.

A court is a tribunal duly constituted and present at the time and place fixed by law for judicial investigation and determination of controversies. The court is not the judge and judges as individuals, but only when at the proper time and place they exercise judicial powers. Both time and place are essential constituents

of the organization of a court that is to say, in order to constitute a court the officer must be present at the time and place appointed by law.

In re Steele, 156 Fed. 854, 856
In re Steele, 161 Fed. 886

A Circuit Judge of the United States may rightfully dispose of any administrative matter in any circuit within his judicial circuit, which may be properly ordered at chambers, without personally going into its territorial limits, wherever his chambers may be for the time being, so long as they are held at any place within his judicial circuit.

Ex parte Harlan, 180 Fed. 128, 129
Horn v. Pierre Marquette R. R. Co., 151 Fed. 626
In re Parker, 131 U. S. 221, 33 L. Ed. 123

Congress has established in each of the states of the United States one or more judicial districts and has also divided the United States into judicial circuits. The boundaries of these districts and circuits are defined. Congress has also provided for the appointment of one or more district judges in each of such judicial districts. The jurisdiction of each of these district courts is coextensive with the boundaries of the judicial district in and for which it is established or created, and extends no further except in those cases where Congress has expressly extended it. The Judicial Code points out these cases. The district judges so appointed cannot act as such and exercise their judicial powers and functions outside their respective districts, except in those cases specially provided for by acts of Con-

gress, and these cases are pointed out in the Judicial Code.

Primos Chemical Co. v. Fulton Steel Corporation, 254 Fed. 454.

The instant case does not come within any of the exceptions or within the class of cases pointed out by the Judicial Code, in which a district judge can act outside of his district.

> "The district court of each judicial district sits within and for that district, and its jurisdiction, as a general rule, is bounded by its local limits."

Toland v. Sprague, 12 Peters 300, 328, L. Ed. 1093;
Devoe Mfg. Co., Petitioner, 108 U. S. 401, 27 L. Ed. 764;
Barrett v. United States, 169 U. S. 218, 221, 42 L. Ed. 723.

The making and signing of findings of fact, conclusions of law, and a decree is the exercise of a purely judicial function. It is the act of the court and not of a judge. The authorities agree upon the proposition that a judicial officer must exercise his judicial power within the territorial limits of his jurisdiction and that any attempted exercise thereof while without such territorial limits is, in the absence of an express provision of law authorizing the same, a nullity.

People v. Ruef, 114 Pac. 48 (Cal.);
Shepherd v. Superior Court, 54 Cal. App. 673, 202 Pac. 466;
Finkle v. Superior Court, 234 Pac. 432 (Cal.);

Eichoff v. Caldwell, 151 Pac. 860 (Okla.);
Dunlap v. Rumph, 143 Pac. 329 (Okla.);
Phillips v. Thralls, 26 Kan. 780;
Dunn v. Travis, 45 Kan. 541, 26 Pac. 247;
Price v. Bayliss, 131 Ind. 437, 31 N. E. 88;
Buchanan v. Jones, 12 Ga. 612;
In the Matter of Kings County, 78 N. Y. 383.

"A judge alone does not constitute a court. Proceedings at another time or place or in another manner than specified by law, though in the personal presence and under the direction of the judge, are coram non judice and void."

Ex Parte Gardner, 22 Nev. 280, 39 Pac. 570.

"The proceedings of a court at a time and place other than that prescribed by law are void. It is not the act of a court at all."

Johnston v. Hunter, 50 W. Va. 52, 40 S. E. 448;
White County Commissioners v. Gwin, 136 Ind. 562, 36 N. E. 237, 242.

"A court is a tribunal organized according to law and sitting at fixed times and places for the administration of justice, not an individual holding a judicial office."

People v. Village of Haverstraw, 151 N. Y. 75, 45 N. E. 384.

II.

SPECIFICATIONS OF ERROR No. 1, No. 2, No. 3, No. 4, No. 12, No. 13 and No. 14,

Libelant's Evidence

All these specifications of error go to the insufficiency of the evidence and may be conveniently argued together.

The government only produced two witnesses who even claimed to have ever seen any liquor on the "Rethalulew." These were two foreign sailors named Eric Johnson and Walter Kruger, who were in the custody of the immigration officials for deportation for several months before their depositions were taken by the government. The testimony of Kruger and Johnson was to the effect that they were members of the crew of the motor schooner "Przemsyl," laden with liquor from Hamburg, Germany. The "Przemsyl" left Hamburg in August, 1927; reached Colon about the end of October, 1927; was taken to New Orleans and there turned over to the Prohibition Enforcement Bureau by its captain and mate in the hope of receiving informer's reward. In the spring of 1928 the "Przemsyl" and her cargo was released by the United States and thereupon she proceeded through the canal zone in the month of June, 1928, finally reaching a point on the California coast, forty miles off San Diego, about the first of July, 1928; that the "Przemsyl" stood off San Diego for about a month, and then moved to a point off San Pedro a distance of forty miles, where she arrived about the 1st of August, 1928; that the "Przemsyl"

stood off or drifted at this point for another month and then moved up the coast to a point about forty miles West of Santa Barbara, where according to the testimony of Kruger and Johnson the vessel drifted for the usual thirty day period. During all of this time the "Przemsyl" was accompanied by a large steamer of seven or eight thousand tons, flying the English flag, named the "L'Aquila," the two vessels being always but 200 or 300 yards apart while drifting on the ocean off the ports mentioned.

At these various stations off the Pacific Coast the two strange sailors, one a German—the other a Swede, first made contact, as they claim, with the respondent boat "Rethalulew" and a speed boat named or numbered A-1817, which was during the early part of August, 1928. According to the testimony of Kruger and Johnson, whenever the "Rethalulew" arrived the A-1817 was with her and both took liquor from the "Przemsyl." According to the witness Kruger, the "Rethalulew" made from fifteen to twenty-five trips to the "Przemsyl" and each time took from 300 to 500 cases of liquor from that boat and finally the "Rethalulew" was used, as they say, to transfer the remainder of the cargo of the "Przemsyl"—2000 cases of alcohol—to the "L'Aquila," and thereafter some time in the month of October, at which time the ships seemed to have parted company (R. 280-312).

The government also introduced a coast guard patrol book covering the months of August and September, 1928, Libelant's Exhibit No. 15, which is separately certified, pursuant to order and stipulation.

The government also put in evidence the incident of

the Coast Guard cutter 253 chasing a speed boat from the "Przemsyl" and "L'Aquila" on September 30, 1928, which speed boat could not be identified by any of the crew of the Coast Guard cutter, (R. 48, 59, 61-73) but it was conveniently identified by the two foreign sailors, Johnson and Kruger, after they had been in the custody of the immigration officials for deportation for several months.

Claimant's Evidence.

To support his case the claimant called as a witness one W. H. Evans, Superintendent of Fellows & Stewart Shipyard Company (R. 130-141), who testified that he was familiar with the respondent boat "Rethalulew" (R. 132), that the boat was on the ways of his shipyard, or in the water at his shipyard, until August 14, 1928, and at that time the engines had not been installed in the respondent vessel. Frank L. Morse, Sr., a marine engine builder (R. 147), who furnished supplies and materials and engine parts for the Rethalulew, and a mechanic to assist in the installation of the engines after the hull was finished (R. 148-149), testified that the work of installing the engines on the "Rethalulew" ran through August almost until the 1st of September, 1928 (R. 149-153); that he had trouble with the gasoline supply (R. 153); that three Liberty motors were installed on the "Rethalulew" after the completion of the hull by the shipbuilding company, which made the time required for the installation of engines longer than usual; that two of the engines were built in the Morse shop (R. 158) and the work of installation was done in Fellows & Stewart's shipyard at Wilmington (R.

158, 228-229). The last week in August they had trouble with the gasoline system; the engine would not turn over 800 revolutions (R. 163) and that with the gas trouble it would be impossible to go anywhere with the respondent boat (R. 163); that it was around the first of September, 1928, when the last payment for the gasoline pumps was made and Morse would not permit the "Rethalulew" to leave Fellows & Stewart's shipyard until they were paid for (R. 164). The witness further testified that the last payment made by Curwin for supplies and work on the engines of the "Rethalulew" was made on September 8, 1928, (R. 226). The witness Morse further testified, on redirect examination, that he began the work of installing the engines in the "Rethalulew" while she was still in the shed at Fellows & Stewart shipyard sometime around the middle of July, 1928, and that they did not finish the work necessary to make her a seagoing boat until almost September 1, 1928, (R. 228); that after launching, the boat did not go out on any cruises; that the witness was over at Fellows & Stewart's shipyard three or four times a week and the respondent boat was always there (R. 229); that his mechanic worked on the boat pretty steady until the middle of August, 1928; then they had trouble with the gasoline system and another of his mechanics went over to help remedy this defect sometime in the latter part of August, 1928; that the witness Morse was keeping close check on the boat during all of this time (R. 229-231).

Frank L. Morse, Jr., witness for the claimant, testified that he was a night watchman on the "Rethalulew" while she was in Fellows & Stewart's shipyard during

the month of July, 1928, until the middle or latter part of August, 1928; that he commenced sometime in July and was night watchman on the boat for six or seven weeks; that he was paid for his work a few days before Labor Day, September 3, 1928, and that that date was not very long after he got off the boat (R. 167-172).

The claimant and appellant testified in his own behalf that during the years 1928 and 1929 he was engaged in the real estate business at Pasadena and that previously he had been engaged in the automobile business and was identified with the Rancho Santa Fe project, as manager of the Pasadena office; that the Santa Fe project was being put in near Del Mar in San Diego County (R. 184-185); that he bought the "Rethalulew" on December 5, 1928, receiving a bill of sale from the only man who had ever owned her after she was built, and that he is still the owner of the "Rethalulew" (R. 186-187); that he first saw the "Rethalulew" on December 1, 1928, and negotiated for her purchase and made inquiries regarding her for a period of five days previous to the purchase; that he paid $9542 for the respondent boat and that it would cost him about $2800 to convert it into a boat of the cruiser type to carry prospective customers to and from the Rancho Santa Fe project (R. 187-189). That the payment was made in cash (R. 193); that at that time claimant had heard nothing as to the boat having been used for any illegitimate purpose (R. 191-197); that he asked the people at Garbutt & Walsh's what they knew about the respondent boat and was questioning everyone, trying to make sure that he was right in buying her (R. 203); that he had never heard of Tony Cornero or Anthony Strallo (R. 203);

that he had never heard of the "Przemsyl" or the "L'Aquila," and had never heard of the "Przemsyl" being libelled until on the trial of this cause (R. 205).

It will thus be seen that the government's case against the respondent boat rests wholly upon the testimony of the two vagrant sailors, Kruger and Johnson, then under arrest for deportation and afterwards deported, who testified that between August 1st and September 30th, 1928, the "Rethalulew" made twenty or twenty-five trips to the "Przemsyl" and that on each trip they loaded several hundred cases of liquor on the respondent boat; that the last trip was made on September 30, 1928, when they testify to the alleged transshipment of liquor from the "Przemsyl" to the "L'Aquila." To corroborate the statements of the two sailors, the government offered in evidence the patrol boat guard book (Libelant's Exhibit No. 15) and by entries made therein by witnesses not produced in court, sought to show that on different days in August the "Rethalulew" was not in the harbor, although the evidence of the witnesses Evans and Morse, which has not been contradicted, shows that at the time the guard book purports to show the supposed absence of the "Rethalulew" from the harbor, she was in fact tied up in Fellows & Stewart's shipyard. The government also offered in evidence, to corroborate the testimony of the two sailors, the testimony of two of the crew of the coast guard cutter 253, and the entries made in the guard book on September 30, 1928, to the effect that on that date they chased a speed boat from the "Przemsyl" and the "L'Aquila," but could not identify the boat. This evidence simply goes to the incident of September 30, 1928, and can

have no force in corroborating the statements of the sailors as to the "Rethalulew's" alleged visits to the "Przemsyl" prior thereto in the months of August and September, each time in company with another speed boat, the A-1817, which boat was also tied up in dry dock from the 9th of July to the 15th of September, 1928.

The Impossible Story Told by Kruger and Johnson as to the Alleged Transshipment of 2000 Cases of Alcohol by the "Rethalulew" from the "Przemsyl" to the "L'Aquila."

A short answer to the impossible story told by the two vagrant sailors as to the alleged transshipment of 2000 cases of alcohol is, that it bears upon its face the brand of its falsity. That is the kind of a story that would only go down with a landsman who had never served an apprenticeship at sea. The two veteran captains of the "Przemsyl" and the "L'Aquila" would never have engaged in such a marine farce forty miles from land on the Pacific Ocean in September, 1928. In order and then hoist the alcohol from the "Przemsyl" to the "L'Aquila," all they had to do was to lash the two ships together, a job of about thirty minutes duration, and then hoist the alcohol from the "Przemsyl" to the "L'Aquila" with the very same derricks they would have had to use in dropping the alcohol from the "Przemsyl" into the "Rethalulew" and then hoisting it from the "Rethalulew" on to the "L'Aquila." This could have been done in one-fifth the time it would have taken to

transship it by means of the "Rethalulew," as told by the fantastic imposters Johnson and Kruger. The two sailors were then under detention by the federal authorities, and their testimony was affected by fear or favor growing out of that detention.

> *Alford v. U. S.,* decided Feb. 24, 1931, Co-op. Advance Sheets, No. 9, 75 L. Ed. 368, 372.

Who can decide when the two sailors were telling the truth, or which one ever tells the truth? Assuming the aspect of the case most favorable to the Government, that they both testified to the first alleged appearance of the "Rethalulew" alongside the "Przemsyl" as being on the 1st of August, 1928, and that she kept coming continuously from that time to the end of September, 1928, they are flatly and indusputably contradicted on that point by the evidence of three disinterested witnesses and reputable business men, Evans and the two Morses; they are contradicted by the records of the Customs Office, which show the "Rethalulew" was not licensed until July 27, 1928, and not launched until July 30, 1928, and at that time the hull of the "Rethalulew" was not yet completed and the engines or motors had not been installed; that the "Rethalulew" was in Fellows & Stewart's shipyard, or in the water tied up to the shipyard, continuously until August 14, 1928; that the engines were not then installed and, therefore, it was impossible for the boat to have been out on the high seas; the testimony of Frank L. Morse, Sr., that his mechanic and another one worked on the "Rethalulew" two or three weeks after the vessel was turned over to the owner and while she was still in the shipyard, and the testi-

mony of the younger Morse that he was on the boat every night at least until as late as the middle of the month of August, 1928. According to the testimony of the two vagrant sailors, Johnson and Kruger, the "Rethalulew" was at the "Przemsyl" at least eight or ten times during the first two weeks in August, 1928, when by the uncontradicted and indisputable statement of Mr. Evans she was still in the Fellows & Stewart's shipyard until the 14th day of August, 1928, and not in a sea-going condition at that time because her engines had not then been installed. Who is telling the truth? Evans, a disinterested witness, Superintendent of Fellows & Stewart's shipyard, who built the boat, or the two vagrant sailors who gave their depositions after several months detention by the Immigration officials for deportation? What object had the Morses, father and son, to falsify for a stranger? Their testimony is worthy of full credence just as much as the testifmony of Mr. Evans. Can the testimony of Kruger and Johnson that the "Rethalulew" was at the "Przemsyl" time after time during the first two weeks in August, taking off liquor, be reconciled with the testimony of Evans and the two Morses? The testimony of the three witnesses, Evans, Morse, Sr., and young Morse, shows that it was an utter impossibility for the "Rethalulew" to have been out at sea during that period of time, between August 1st and August 14th, 1928. Thus no credence or weight can be given to the evidence of the two sailors as to the whereabouts of the "Rethalulew" during the first two weeks in August, 1928, and if they would lie about her whereabouts at that time they are not worthy of belief on any question

as to the number of times they saw the "Rethalulew" and what her activities were at the times they claimed to have seen her alongside the "Przemsyl." If the maxim, Falsus in Uno, Falsus in Omnibus, was ever applicable to any case or witness, or the testimony of any witness, then it is applicable to the testimony of the libelant's witnesses, Walter Kruger and Eric Johnson. The testimony of Evans alone should settle the question of where the "Rethalulew" was until August 14, 1928.

That Kruger's testimony is flat perjury is also conclusively proved by the witness W. E. Dresser (R. 173, 182). This evidence shows that Kruger did not know the name of the "Rethalulew" and had never seen or heard of such a speed boat until December, 1928. Dresser was a prohibition officer who took Kruger in charge on December 3, 1928, and had him in charge until December 9, 1928, inclusive, and during that time Kruger was being closely examined by Dresser to discover the names of the speed boats that had been out to the "Przemsyl." Dresser boarded the "Przemsyl" on December 3, 1928, and interviewed Kruger (R. 173-174), and Dresser then knew what the "Przemsyl" had been doing (R. 174). On December 3, 1928, Kruger told Dresser that speed boats had been out to the "Przemsyl," but did not mention the name "Rethalulew" (R. 174), although Dresser asked Kruger the names of the speed boats (R. 176). On December 9, 1928, Dresser conducted Kruger to various shipyards in Los Angeles Harbor and Long Beach Harbor, and showed him various boats which were docked there (R. 176). Before Dresser took Kruger out to search the shipyards

and comb the beaches, Dresser had asked Kruger the names of the speed boats that had visited the "Przemsyl"; Dresser also asked Kruger the names of the speed boats on December 5, 1928, and Kruger could not at that time tell him the names of the speed boats that had been out to the "Przemsyl" (R. 177-178). On December 9, 1928, after combing the shipyards from Long Beach to San Pedro, in company with Dresser, Kruger pointed out the "Rethalulew" as one of the boats that had been at the "Przemsyl." Previous to that time, December 9, 1928, Kruger had never mentioned the name of "Rethalulew" to Dresser at any time. The evidence on this point is very decisive, so we quote it verbatim:

> "Q. Well, on the 5th of December did he tell you what boats he had seen out there?
>
> A. He did not.
>
> Q. Did he tell you on the 9th?
>
> A. He pointed out a certain boat that he said he identified as one of the boats that had been at the "Przemsyl"
>
> Q. What boat was that?
>
> A. The "Rethalulew."
>
> Q. Had he mentioned that name before?
>
> A. I believe not.
>
> Q. So, for the first time, you want to say that on the 9th of December was the first time that you had information from Kruger as to the "Rethalulew?"
>
> A. *The first time he identified the boat, yes, sir."* (R. 178).

Thus we have before us the testimony of Kruger, who swears he saw the "Rethalulew" fifteen to twenty times and each time helped to load her with a cargo of from

300 to 500 cases of liquor, and the testimony of Dresser, who says that Kruger never mentioned or told him the name "Rethalulew" until December 9, 1928, after she had been pointed out by Dresser. Then for the first time the name of "Rethalulew" got into the mind of Kruger. It is impossible that Kruger could have worked around the "Rethalulew" as long as he claims he did without knowing her name. It is an undisputed fact in the record that he name was painted on her stern in large letters. Had Kruger known the name of the "Rethalulew" prior to December 9, 1928, he would have immediately given it to Dresser in interviews he had with him previous to December 9th and then, in order to find the "Rethalulew," it would not have been necessary to search the coast and harbors from Long Beach to San Pedro. After Kruger had seen the "Rethalulew" in the harbor on December 9, 1928, that name easily dovetailed into his testimony given on June 5, 1929, Kruger not knowing the name of "Rethalulew" until months after the alleged transactions he testified to, cannot be believed in a single point of his testimony. Again we say, if the maxim, Falsus in Uno, Falsus in Omnibus, was ever applicable to any case or witness, or the testimony of any witness, then it is applicable to the testimony of the appellee's witnesses, Walter Kruger and Eric Johnson.

The Helen W. Martin, 108 Fed. 317;
Shecil v. United States, 226 Fed. 184.

SPECIFICATION OF ERROR No. 7.

The Admission in Evidence of the Coast Guard Patrol Book, Libelant's Exhibit 15.

To corroborate the decidedly unreliable testimony of Kruger and Johnson, the government introduced a coast guard patrol book covering the months of August and September, 1928, entries in which were in part made by a coast guardsman who was not within the Los Angeles district and, therefore, was not called to verify his entries (R. 253-254). This patrol guard book purports to show that the "Rethalulew" was not located by the patrol boat in the harbor at San Pedro on various days in August and September. The attempt of the government to prove the verity of the entries in the alleged patrol or guard book, or more properly speaking, the memoranda of the doings of the coast guard cutter engaged in harbor patrol at the Base in the months of August and September, was based on the testimony of a witness named Horace Anderson (R. 253-261). His evidence showed that he did not make any entries in the book; they were made, according to the witness Anderson, chiefly during that period of time by one B. N. Hansen (R. 254), and were not made by the witness Anderson. The witness Anderson did not come to the coast guard base at San Pedro until October, 1928 (R. 256), nor was he able to identify Hansen's writing but once out of eleven examples from said book (R. 257-258-259). This witness also testified that the guard book offered in evidence was not the only book of the harbor patrol and that there were others just exactly like it (R. 258). All the other entries not

made by Hansen in the guard book, offered in evidence for the purpose of attempting to prove the whereabouts of the "Rethalulew" on certain days in August and September, 1928, were made by a man named Irby, who was then at the Base in San Pedro, but was not called as a witness, although within the district, and by two other men, Tucker and Ellis, who were also in the Los Angeles district at the time of the hearing (R. 256, 275, 258), and who likewise were not called as witnesses.

This guard book, as evidence against the appellant, is the rankest kind of hearsay, and it is not a public record. It was nothing, more or less, than the self-serving declarations of the government made through its coast guardsmen, purporting to record the presence, or *absence,* from the harbor on certain days of boats that were registered at the Los Angeles Custom House. Not a modicum of evidence was given to prove its authenticity or what pains the guardsmen took in searching the harbor prior to making the entries; the entries were not made at the time of the search, but supposedly on the return of the patrol boat to the Base, and whether on that day or what day, we are left in utter ignorance and it may fairly be considered as a record based not upon facts, but upon the memories of sailors recording not what they had seen, but what they had not seen.

SPECIFICATIONS OF ERROR Nos. 8 AND 9

The Offer of the Testimony of the Witnesses L. H. Williams and Leonard Wood as to the Whereabouts of the Boat A-1817 During the Months of August and September, 1928, Should have Been Allowed and the Evidence Received and Considered by the Court.

On the hearing of this case, the claimant produced a witness named L. H. Williams, whose occupation was that of boatswain attached to Coast Guard Section 18, and was engaged in that occupation during the months of August and September, 1928. The witness was placed on the stand and duly sworn, and by him the claimant made the offer of proof found in Amendment to Assignment of Errors No. 9 (R. 406, 125), and in Specification of Error No. 9. The claimant also called to the stand a witness named Leonard Wood, whose occupation was that of billing clerk at the Los Angeles Shipyards during the months of July, August and September, 1928, and after the said witness was duly sworn, made the offer of proof found on page 120 of the Record, being Assignment of Error No. 8 (R. 397) and Specification of Error No. 8. The witnesses Kruger and Johnson have testified all through their depositions that the A-1817 came alongside the "Przemsyl," in company with the "Rethalulew," time and time again during the months of August and September, 1928, both boats being nearly always together; that both boats took a cargo from the "Przemsyl" each time they appeared

there together. The witness Kruger is very positive on this point (R. 315, 317, 321, 335, 336, 338, 345, 346, 347, 351).

The issuable fact in this case is, did the "Rethalulew" engage in the carrying of cargo from the "Przemsyl" in the months of August and September, 1928? The evidence on that point is very unreliable and conflicting. The principal fact sought to be established by the government in this case rests wholly upon the truthfulness of the witnesses Kruger and Johnson and the credibility to be given to their evidence. If it was impossible for the A-1817 to be at the "Przemsyl" taking on cargo when Kruger and Johnson say she did, sometimes in company with the "Rethalulew," and sometimes alone, in the month of August and up to the 15th day of September, 1928, that is a relevant fact which the claimant was entitled to prove, as it directly contradicted the witnesses Kruger and Johnson as to the transactions to which they have testified, and also established that their testimony was not reliable. Kruger and Johnson could not be telling the truth about the whereabouts of the "Rethalulew" if they were lying about the whereabouts of the A-1817 at exactly the same time, as their testimony linked the two boats together at innumerable times during the period covered by the transactions they have testified to. If the A-1817 was not at the "Przemsyl" and could not have been there, either alone or in company with the "Rethalulew," during the period of time from July 9th to September 15th, 1928, then the witnesses Kruger and Johnson were not simply mistaken, but they were deliberately falsifying. If they were falsifying as to the alleged presence of the A-1817 at

the "Przemsyl" in mid ocean at a time when, in fact, the A-1817 was in the dry dock of the Los Angeles Shipyards, why would they not falsify as to the alleged presence and activities of the "Rethalulew" during the same period of time? Their testimony links the two boats indissolubly together as engaged in one and the same transaction, and the claimant was entitled to show that at least half of the transaction could not have occurred, for if half of a transaction, as testified to by the witnesses, did not take place, it is an almost irresistible conclusion that the other half did not. It is a well established rule of evidence that where there is such logical connection between the fact offered as evidence and the issuable fact, that proof of the former tends to make the latter more probable or improbable, the testimony offered is relevant if not too remote. We submit that the following cases sustain our position and that this Honorable Court, in deciding this case, should consider the offered evidence of the witnesses Leonard Wood and L. H. Williams, appearing on pages 120, 121 and 125 of the Record.

> "It is well settled that if the evidence offered conduces in any reasonable degree to establish the probability or improbability of fact in controversy, it should be admitted. It would be a narrow rule and not conducive to the ends of justice, to exclude it on the ground that it did not afford full proof of the non-existence of the disputed fact."
>
> *Home Ins. Co. v. Weide,* 11 Wall. 438, 439, 20 L. Ed. 198.

"Evidence which conduces, though but slightly, to prove a fact in issue, or to repel a presumption

which might otherwise arise favorable to the opposite party, is admissible and in case of doubt the evidence should not be excluded."

Louisville Ry. Co. v. Ellerhorst, 110 U. S. 823.

"Where testimony is admitted tending to show facts claimed by the opposite party to have existed as part of the transaction with which the defendant is charged, *specific* facts may be proved *showing the contrary*. It tends to contradict the witnesses and to show that their testimony is not reliable."

Wentworth v. Eastern R. Co., 143 Mass. 248, 9 N. E. 563.
Ross v. Boston & Worcester R. Co., 6 Allen (Mass.) 8.
Carroll v. Harris, 186 N. Y. Supp. 539.
Loring v. Worcester Ry. Co., 131 Mass. 469.
2nd Jones Comm. on Evidence, Sec. 718, p. 1346.

"The competency of a collateral fact to be used as the basis of legitimate argument is not to be determined by the conclusiveness of the inference it may afford in reference to the litigated fact. It is enough if these may tend even in a slight degree to elucidate the inquiry or to assist, though remotely, to a determination probably founded on truth."

Holmes v. Goldsmith, 147 U. S. 150, 164, 37 Law Ed. 118;
Interstate Comm. Com. v. Baird, 194 U. S. 25, 44; 48 Law Ed. 860.
The Squanto, 13 Fed. (2nd) 548.

"In short, the rule as to relevancy expands to meet the exigencies of a particular case. Where the testimony upon a vital issue is contradictory

evidence of a collateral fact tending to show which statements are the more probable, reasonable or credible may be admitted in the discretion of the court."

Farmers Bank v. Przymus (Minn.) 200 N. W. 931.

"Where there is a conflict of testimony of witnesses, evidence is admissible of collateral facts which have a direct tendency to show that the testimony of one set of witnesses is more probable than that of the other."

Glassberg v. Olson, 89 Minn. 195 94 N. W. 554.
Phillips v. Mo., 91 Minn. 311, 97 N. W. 969.
Louisville Ry. Co. v. Ellerhorst, 129 Ky, 142, 110 S. W. 823.

"Likewise when the evidence is evenly balanced, evidence of collateral facts is admissible for the same reason."

Lewis, Cooper & Hancock v. Utah Consl., 10 Ida. 214,
Humphrey v. Monida Stage Co., 115 Minn. 18, 131 N. W. 498.

"Where there is a direct conflict in the evidence of witnesses relating to a material issue in the case, any collateral fact or circumstance tending in any reasonable degree to establish the probability or improbability of the fact in issue, is relevant evidence and proper for the consideration of the jury."

Shepherd v. Lincoln Traction Co., 79 Nebr, 834, 113 N. W. 627.
Bowers v. Pixley, 197 N. W. 418.

SPECIFICATIONS OF ERROR Nos. 10 AND 11.

The Claimant Is a Bona Fide Purchaser For a Valuable Consideration Without Notice.

The record in this case discloses that all of the evidence offered by the Government as to the alleged illegal activities of the "Rethalulew" ends on September 30, 1928, and the respondent vessel was not libelled by the Government until April 22, 1929. The Claimant purchased the "Rethalulew" on December 5, 1928. During all that time, a period of over six months, the Government made no sign, took no steps, and did nothing to indicate to the outside commercial world that it considered the "Rethalulew" as a boat engaged in any trade or business other than that for which she was licensed.

Claimant desired the boat for use, in good faith, in his real estate operations, and has fully explained the delay in putting the "Rethalulew" to such use. The claimant before and at the time of buying the "Rethalulew" made inquiries at the Customs Office as to the status of the boat, and found that there was nothing against her, no charges of any kind whatsoever; the claimant went to the Fellows & Stewart Shipyard Company, the builder of the "Rethalulew," and found that the boat had been built for one James H. Curwin, who was then the registered owner and had been paid for by Curwin in cash, that being the ordinary way and usual manner of the company in transacting such business. (R. 138). He found that Curwin, the man who was selling him the boat, was the registered owner and

the only owner the boat had ever had; that there were no liens of record against her. The Customs Officers gave the "Rethalulew" a clean bill of health and her license was still in full force and effect. The claimant also inquired of the Garbutt & Walsh Shipbuilding Company as to the "Rethalulew," her worth and status, and was told by those people, experienced in the ship business, that the "Rethalulew" was all right and a good buy. Claimant asked others around the harbor as to the "Rethalulew" and all of the answers to his inquiries were favorable. He paid the purchase price in cash—$9542.00—(42 dollars being expenses attendant to the transfer) receiving a bill of sale, which he recorded at the proper office, and a license was duly issued to him by the proper officials of the United States Government in control of shipping at the Port of San Pedro —the very persons who would or should have known if there were any rumors afloat as to any alleged illegal doings of the "Rethalulew."

The claimant made all of the inquiries required by the law to protect him in his purchase. All answers to his inquiries were favorable to the purchase and showed that the boat had a clean record. If there were any facts of public knowledge inimical to the reputation or legal status of the "Rethalulew" on or before December 5, 1928, why did the Government stand by and neglect to bring libel proceedings against the boat until April 22, 1929? If the Government was *not* cognizant of any suspicious facts or circumstances concerning the "Rethalulew" on December 5th, 1928, how could any further inquiries on the part of the claimant have disclosed any? There were no liens endorsed on her cer-

tificate of enrollment or license, and nothing in the way of notice, either actual or constructive, of the Government's claim, which was not made until five months later.

The claimant had been actively engaged for seven years in the automobile business and when he had inquired at the source of title and found that the "Rethalulew" had only had one owner, that he had a good title and was then offering her for sale; and the Government officials, whose registration of the vessel was the only thing that could make the boat of any value to the claimant, ready and willing to issue a new license to claimant as its owner, they not knowing of any facts or circumstances that would have precluded them from issuing a new license and the claimant given a proper muniment of title by the seller, the rights of the claimant are protected from a future attack upon him by the Government, whose officials should have known and would have known of any charges made against the boat by the Government, or any defects in its title, by the law as laid down in the following cases:

> "Courts of admiralty are chancery courts for the seas and disposition of marine demands against vessels on principles of equity. Outstanding claims should not be enforced to the embarrassment of commerce and subsequent bona fide purchasers of vessels.
>
> *The Favorite*, 8 Fed. Cases #4696.
> *The Sarah Ann*, Fed. Cases #12342.
>
> "The rights of a subsequent bona fide purchaser for value, without notice, will always be recognized,

especially if the libelant has notice of the sale. A tacit right of forfeiture is lost or will be deemed waived by unreasonable delay in enforcing it. It will not be upheld in prejudice of an innocent purchaser for value, without notice, in favor of a libelant who seels to enforce it inequitably."

The Bolivar, 3 Fed. Cases 1609.

"The essential elements that make a bona fide purchaser are a valuable consideration, the absence of notice and the presence of good faith."

Houston Oil Co. of Tex. vs. Wilhelm, 182 Fed. 474, 477; 104 C. C. A. 618.

"To entitle a defendant to protection as a bona fide purchaser, and without notice of liens which had been previously conveyed by the grantor, he must allege and prove not only want of notice but also actual payment of the purchase money independently of the recitals in his deed which do not constitute proof of such payment."

Johnson v. Ga. Land & Trust Co., 141 Fed. 597, 72 C. C. A. 639.

"If a second purchaser for value and without notice purchases from a first purchaser, who is charged with notice, he thereby becomes a 'bona fide purchaser' and is entitled to protection."

Coombs v. Aborn, 68 Atl. 817, 29 R. I. 40; 14 L. R. A. (N. S.) 1248.

"Three months may render a claim stale, and bar the libelant from enforcing his or its rights as where the libelant has stood by and permitted the

ship to pass into the hands of an innocent purchaser, while perhaps three years would not be sufficient without change of ownership."

Coburn v. Factors & Traders Co., 20 Fed. 644, 647.

"Admiralty denies the privilege of enforcing a right of forfeiture which has been suffered to lie dormant without excuse until the rights of innocent third purchasers have intervened and would be prejudiced if it should be recognized."

The Bristol, 20 Fed. 800.
The Lyndhurst, 48 Fed. 840.
The Nikita, 62 Fed. 936, 10 C. C. A. 674.

We insist that the claimant has shown bona fidas, the payment of a valuable consideration, a total lack of notice of any claim or demand of the Government or any other person against the "Rethalulew" at the time of his purchase, or afterwards, until this libel was brought.

III.

SPECIFICATIONS OF ERROR No. 6 AND No. 15.

By these specifications of error is challenged conclusion of law No. 2, made by the Commissioner (R. 377) and conclusion of law No. 1, made by the Court (R. 389), said conclusions of law being that the Triple Gas Screw Motor Boat "Rethalulew," Official No. 227860, was fraudulently registered in violation of Title 46, U. S. C. Section 60, the said conclusions of law being wholly unsupported by the evidence, and are

founded upon a presumption unsupported by any fact from which such a presumption could be inferred, and such conclusions are made in the teeth of the statute upon which they are supposed to be based. The court by its finding of fact No. 8 (R. 388) finds, that at the time the respondent vessel was enrolled and licensed on July 30, 1928, in the United States Custom House at San Pedro, California, that such enrollment and licensing was fraudulent, in that at said time and place the owner and master, knowing that the respondent vessel "Rethalulew" was not to be used exclusively for pleasure and that said motor boat was to be used in trade, knowingly and fraudulently represented that the said motor boat "Rethalulew" would be used exclusively for pleasure and would not be used in trade, and the Commissioner made a finding on the same subject, that the short period of time elapsing between the date of registration of the vessel and the alleged violations of her registry, gives rise to the presumption that the owner and master knew at the time of registration that the vessel was to be used for a purpose other than that for which she was registered (R. 377).

We thus have the case of a vessel being forfeited on a presumption of a fraudulent intention, of which there is no evilence in the record. There is not a syllable of evidence in this record, other than the uncorroborated evidence of the two foreign sailors, that the "Rethalulew" engaged in any trade prior to September 30, 1928.

To sustain a forfeiture under the statute in question, 46 U. S. C., Sec. 60, the vessel for whom such enrollment or license is knowingly and fraudulently obtained,

must be a vessel not at that time entitled to the license or enrollment, and the party procuring the license or enrollment must have concealed from the government authorities facts existing at the time, and not something that might happen in the future, in order to make the obtaining of the license or enrollment of the vessel knowing and fraudulent; and the intention must have existed in the minds of the master and owner at the time they obtained the license. A presumption cannot be founded upon disputed facts. The evidence of two vagrant perjurers, and a finding thereon by a court, do not make that evidence undeniable truth. A fact from which a presumption of fact is sought to be drawn must be a fact undeniable in itself, and not one that is disputed or disputable. There are no statutory presumptions in this case, such as there is in the Narcotics Law, that when evidence, however flimsy, is given of an assumed fact, that it is then encumbent upon the defendant to prove the falsity of that fact in order to escape conviction. But by the conclusions of law made by the Commissioner and the Court in this case, they have imported into this case a *statutory presumption* of guilty and fraudulent knowledge, not found in the statute, on the part of the master and owner of the "Rethalulew" at the time of the licensing of the vessel, upon only a modicum of evidence, in itself unreliable, as to what use the boat was put to some thirty or sixty days after its being licensed and enrolled.

In law, every man is presumed to act in the ordinary affairs of life honestly and in good faith, and not fraudulently, and there is no such thing in law as a presumption that a man acted fraudulently on a certain

date in the past, when the presumption is drawn from acts done in the future, even though those acts be indisputably proved. In other words, you cannot make a presumption of fact walk backwards.

Under the statute involved in this case, fraudulent intent must have existed in the minds of the applicants at the time the license was obtained, and it cannot be presumed on disputed facts claimed to have occurred two months later that such application was knowingly and fraudulently made when the license was obtained. As we have before stated, a presumption must be based upon a fact existing at the time the presumption is made to take effect.

> "A presumption is an inference as to the existence of a fact not actually known, arising from its usual connection with another which is known."
> *Home Ins. Co. v. Weide,* 11 Wall. 438, 442.
> *Ezzard v. United States,* 7 Fed. (2d) 808, (8 C. C. A.)

It is not sufficient to presume an intent, nor to presume that because no cargo was ever entered at a port of entry by that ship, that the offense of violating the vessel's license and enrollment has been committed.

> *Keck v. United States,* 172 U. S. 434, 43 L. Ed. 505, 509.

Presumptions are in general, classed as conclusive and disputable, and regardless of the class to which they belong, are rules of law, or more particularly, rules of evidence. They are indulged in by a process of artificial reasoning known as conclusions of law, and arise from the doctrine of possibilities. The *future* is

measured and weighed by the *past, not the past by the future happening.* What has *happened in the past,* under the same conditions, will probably *happen in the future,* and ordinary and probable *results* are presumed to take place *in the future* until the contrary is shown.

Judson v. Giant Powder Co., 107 Cal. 549, 40 Pac. 1020.

Bagnall v. Roach, 76 Cal. 106, 18 Pac. 137, 138.

An act which in itself is lawful and innocent is never presumed to be fraudulent, and the burden rests on the party assailing it to prove it. Fraud cannot be inferred by the court from acts legal in themselves, and consistent with an honest purpose. In all proceedings instituted to forfeit property, to recover moneys, or to set aside and annul deeds or contracts or other written instruments, on the ground of alleged fraud practiced by a defendant upon a plaintiff, the rule is of long standing and is of universal application, that the evidence tending to prove the fraud and upon which to found a verdict or decree must be clear and satisfactory. It may be circumstantial, but it must be persuasive. A mere preponderance of evidence which at the same time is vague or ambiguous is not sufficient to warrant a finding of fraud, and will not sustain a judgment based on such finding.

Budd v. Commissioner on Internal Revenue, 43 Fed. (2d) 509, 512, (C. C. A. 3);

Lalone vs. United States, 164 U. S. 255, 257, 41 L. Ed. 425;

Foster vs. McAlester, 114 Fed. 145, 149, 152 (C. C. A. 3).

SPECIFICATIONS OF ERROR No. 5, No. 15, No. 16, No. 17, No. 18, No. 19 AND No. 20.

A. E. 5, R. 377; A. E. 17, A. E. 24, A. E. 25, A. E. 26, A. E. 27, R. 402; A. E. 28, A. E. 29, R. 43. These specifications all go to the point that the Commissioner and the Court erred in making their conclusions of law, and each of them, in finding the issues against the libelant, and that the decree is contrary to law. The findings of the Commissioner and the Court on this point are that the respondent vessel "Rethalulew" "engaged in trade in violation of her license," contrary to the provisions of 46 U. S. C. A., Sec. 325. This raises the question as to whether, assuming as true the improbable story that the respondent vessel transhipped 2000 cases of alcohol from a ship flying the German flag to a ship flying the English flag, on the high seas, more than forty miles from the coast line of the United States, such transshipment being over a distance of only 200 or 300 yards in mid ocean, was engaging in trade? There is no evidence that the respondent vessel ever received one nickel for transshipping those 2000 cases, assuming it to be true that such transshipment was made. Trade is an occupation carried on for gain, not for charity. True, the "Rethalulew" was licensed as a pleasure yacht, but what Solomon in all the ages has ever been able to define what pleasure is? There is not a syllable of evidence that there was any trading done. The evidence is that they carried liquor from the "Przemsyl" to the "L'Aquila," but not even the vagrant sailors had the hardihood to say that they carried liquor, or any other goods or commodities, from the "L'Aquila"

to the "Przemsyl." There was no compensation paid, no trading done, no exchange of goods; they were on the high seas outside of the territorial jurisdiction of the United States and twenty-eight miles outside of the twelve mile liquor limit that has been extended to the United States by the grace of Wayne B. Wheeler and the King of Great Britain.

The Construction of the Statute, 46 U. S. C. A., Section 325.

The words of the statute, that is criminal in effect, are not to be twisted to suit the whims of the prosecuting officers of the Prohibition Enforcement Bureau, and when Congress passed that Act (Section 325) and used the words "in any other trade than for which she is licensed," they used the word "trade" in the common legal acceptation of the term as laid down by the decisions of the courts at that time and since. This statute is the Act of February 18, 1793, passed shortly after the adoption of the Constitution, in which the same word is used, and the word "trade" as used in 46 U. S. C. A., Section 325, and in the Constitution of the United States, has been construed by some of the greatest lawyers that ever sat on the Supreme Court of the United States.

46 *U. S. C. A.*, Section 325, under which the forfeiture has been declared, provides in part:

> "Whenever *any licensed vessel* . . . . *is employed in any other trade* than that for which *she is licensed* . . . . such vessel with her tackle, apparel, furniture and the cargo found on board her shall be forfeited."

There are two elements to an offense under this particular part of this statute; first, the vessel must have an existing license, and second, the vessel while licensed must be employed in a trade other than that for which she is licensed. This is a penal statute and is, therefore, not to be construed so as to include cases other than those which clearly appear to have been intended by the legislature and are fairly included in the language used to express such intention, however much they may appear to be within the reason, or what is called the equity of it.

United States v. Hamilton, 26 Fed. Cas. No. 15289;
Crooks v. Harrelson, U. S. Sup. Court Advance Opinions for 1930, No. 2, pp. 50, 53, L. Ed. Decided Nov. 24, 1930.

The power of Congress to regulate the enrollment and licensing of ships and vessels engaged in the coastwise trade under the Act of Congress heretofore cited is derived from the Commerce Clause of the Constitution, Article I, Section 8, Clause 3, which gives Congress power "to regulate commerce with foreign nations, and among the several states and with the Indian tribes."

Gibbons v. Ogden, 9 Wheat. 1; 6 L. Ed. 23;
Lottawanna, 21 Wall. 558, 577; 22 L. Ed. 654;
Sinnot v. Davenport, 22 How. 227, 240; 16 L. Ed. 243;
Hayes v. Pac. Mail Steamship Co., 17 How. 596, 597; 15 L. Ed. 254;
Smith v. Maryland, 18 How. 71, 74; 15 L. Ed. 269;
Moran v. New Orleans, 112 U. S. 69, 71; 28 L. Ed. 652;

Morgan v. Parham, 16 Wall, 471; 21 L. Ed. 303;
Transportation Co. v. Wheeling, 99 U. S. 273; 25 L. Ed. 412;
Wiggins Ferry Co. v. East St. Louis, 107 U. S. 365; 27 L. Ed. 419;
Gloucester Ferry Co. v. Pa. 114 U. S. 196, 210; 29 L. Ed. 158;
Old Dominion Steamship Co. v. Virginia, 198 U. S. 299, 307; 49 L. Ed. 1059;
Huss v. New York & Porto Rico Steamship Co., 182 U. S. 393; 45 L. Ed. 1146;
Henderson v. New York, 92 U. S. 270, 23 L. Ed. 543, 548;
North River Steamboat Co. v. Livingston, 3 Cow. 713;
New York v. Independent Steamship Co., 22 Fed. 801.

The word "commerce" as used in the Commerce Clause of the Constitution comprehends not merely traffic but intercourse for the purposes of trade in any and all of its forms, including within these terms transportation and transit. Such transportation and transit embraces the transportation and transit of persons and property by land or by water and navigation.

Gibbons v. Ogden, supra;
County of Mobile v. Kimball, 102 U. S. 691, 702; 25 L. Ed. 238;
McCall v. California, 136 U. S., 104;
Gloucester Ferry Co. v. Pa., supra.

The term "trade" as used in the Navigation Laws being included within the term "commerce" means the trade and commercial intercourse between one destina-

tion and another with navigation as the means of transportation.

> *Henderson v. New York*, 92 U. S. 270, 23 L. Ed. 543, 548.

In the case of *Gibbons v. Ogden*, supra, Mr. Chief Justice Marshall said at page 68:

> "Commerce, undoubtedly, is traffic but it is something more; it is intercourse. It describes the commercial intercourse between nations in all its branches and is regulated by prescribing rules for carrying on that intercourse. . . .
>
> "If commerce does not include navigation, the government of the Union has no direct power over that subject, and can make no law prescribing what shall constitute American vessels or requiring that they shall be navigated by American seamen. Yet this power has been exercised from the commencement of the government, has been exercised with the consent of all, and has been understood by all to be a commercial regulation. All America understands, and has uniformly understood, the word "commerce" to comprehend navigation."

And on page 69:

> "They never suspected that navigation was no branch of trade, and was, therefore, not comprehended in the power to regulate commerce. . . .
>
> "The word used in the Constitution, then, comprehends, and has been always understood to comprehend, navigation within its meaning; and a power to regulate navigation is as expressly granted as if that term had been added to the word "commerce."

"To what commerce does this power extend? The constitution informs us, to commerce "with foreign nations, and among the several states, and with the Indian tribes."

"It has, we believe, been universally admitted that these words comprehend every species of commercial intercourse between the United States and foreign nations. No sort of trade can be carried on between this country and any other to which this power does not extend."

On page 70:

"This principle is, if possible, still more clear when applied to commerce among the several states. They either join each other in which case they are separated by a mathematical line, or they are remote from each other in which case other states lie between them. What is "commerce" among them; and how is it to be conducted? Can a trading expedition between two adjoining states commence and terminate outside of each? And if the trading intercourse between two states remote from each other, must it not commence in one, terminate in the other and probably pass through a third? . . . . The power of Congress then comprehends navigation within the limits of every state in the Union; so far as that navigation may be, in any manner connected with 'commerce with foreign nations, or among the several states or with the Indian Tribes.'"

On page 74:

"The word 'license' means permission, or authority; and a license to do any particular thing is a permission or authority to do that thing; and if

granted by a person having power to grant it, transfers to the grantee the right to do whatever it purports to authorize. It certainly transfers to him all the right which the grantor can transfer, to do what is within the terms of the license.

"The coasting trade is a term well understood. The law has defined it, and all know its meaning perfectly. The act describes with great minuteness, the various operations of a vessel engaged in it; and it cannot, we think, be doubted, that a voyage from New Jersey to New York is one of those operations.

"If, as our whole course of legislation on this subject shows, the power of Congress has been universally understood in America to comprehend navigation, it is a very persuasive, if not a conclusive argument, to prove that the construction is correct; and, if it be correct, no clear distinction is perceived between the power to regulate vessels employed in transporting men for hire, and property for hide. The subject is transferred to Congress, and no exception to the grant can be admitted which is not proved by the words or the nature of the thing. A coasting vessel employed in the transportation of passengers is as much a portion of the American marine as one employed in the transportation of a cargo * * *."

In the case of *Henderson v. New York*, 23 L. Ed. 543, at 548, the court said:

"Commerce with foreign nations means commerce between citizens of the United States and citizens or subjects of foreign governments. It means trade and it means intercourse. It means commercial intercourse between nations and parts of nations in

all its branches. It includes navigation as the principal means by which foreign intercourse is effected. To regulate this trade and intercourse is to prescribe the rules by which it shall be conducted."

In the case of *Wiggins Ferry Co. v. East St. Louis,* 27 L. Ed. 419, at 424, the court said:

> "The power of Congress to require vessels to be enrolled and licensed is derived from the provision of the Constitution which authorizes it to regulate commerce with foreign nations and between the several states."

In the case of *Sinnott v. Davenport,* 22 How. 227, 16 L. Ed. 243, at p. 247, the court said:

> "The whole commercial marine of the country is placed by the Constitution under the regulation of Congress, and all laws passed by that body in the regulation of navigation and trade, whether foreign or coastwise, is therefore but the exercise of an undisputed power. * * *
>
> "The power of Congress, however, over the subject does not extend further than the regulation of commerce with foreign nations and among the several states."

In the case of *Huss v. New York and Porto Rico Steamship Co.,* 182 U. S. 392, 45 L. Ed. 1146, at 1151, the court said:

> "The use of the words "coasting trade" indicates very clearly that the words were intended to include the domestic trade of the United States upon other than interior waters."

The primary meanning of the word "trade" as used in the navigation laws of the United States means, therefore, that the vehicle or vessel employed in the trade must be used as the means of transportation or navigation of persons or property from one point within the United States to another point within the United States or to a foreign country, for hire.

The Alex Clark, 294 Fed. 905;
United States v. Canal Boat, Ohio, 9 Phila. 448, 460, 269 Fed. 691.

The Willie G., Fed. Cas. No. 17762, where the court said:

> "The use of the words 'coasting trade' indicates nation was had under this section are cases where the vessel had been employed as a carrier of merchandise in the expectation of profit in the usual and ordinary course of navigation."

The Nymph, Fed. Cas. No. 10388.

The power to regulate the licensing of vessels being based upon the commerce clause of the Constitution, the word "trade" as used in the statutes can not be broader than the term "commerce." The term "commerce" as used in that clause in respect to navigation and shipping means, as the above cited cases point out, commerce or commercial intercourse by navigation, and commerce or trade must, therefore, involve the transportation of persons or property by means of navigation of ships or vessels from one point to another.

Conclusion

Wherefore, appellant prays that this court enter judgment herein for the appellant, or that the judgment of the trial court be reversed and the case remanded for a new trial, and for such other and further relief as to the court shall seem proper in the premises.

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